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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF THE PETITION
OF DIECA COMMUNICATIONS, INC.
dba COVAD COMMUNICATIONS
COMPANY FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION.

DOCKET NO. T-03632A-04-0425
T-01051B-04-0425

**QWEST CORPORATION'S
COMMENTS RELATING TO THE
FCC'S WIRELINE BROADBAND
ORDER**

Pursuant to the Procedural Order issued November 7, 2005, Qwest Corporation ("Qwest") submits these comments addressing the effect of the FCC's recently issued *Wireline Broadband Order*¹ on the issues in this interconnection arbitration between Qwest and Covad Communications Company ("Covad").

I. INTRODUCTION

As discussed below, by establishing that wireline Internet broadband service is an information service and not a telecommunications service, the FCC's order calls into question whether Covad still qualifies as a "telecommunications carrier" that is entitled to enter into an interconnection agreement under Section 252 of the Act. Under Section 252, only telecommunications carriers -- which are carriers that offer telecommunications

¹ *In the Matter of Appropriate Framework for Broadband Access to Internet Order Wireless Facilities, et al.*, CC Docket No. 02-33, *et al.*, FCC 05-150, Report and Order and Notice of Proposed Rulemaking (September 25, 2005) ("*Wireline Broadband Order*").

1 service -- are permitted to negotiate and arbitrate interconnection agreements. Covad's
2 primary, if not exclusive, service offering in Arizona is wireline broadband access. If that
3 service is comprised of DSL bundled with Internet access and is Covad's only offering in
4 Arizona, the *Wireline Broadband Order* establishes that Covad would now be an
5 information service provider, not a telecommunications carrier. The *Wireline Broadband*
6 *Order* also establishes that even if Covad is offering DSL transmission service unbundled
7 from Internet access, it still may not be a telecommunications carrier if it is offering that
8 transmission as an information service.

9 These new FCC pronouncements relating to wireline broadband Internet access
10 require that Covad provide factual information about its Arizona service offerings to
11 enable the Commission to determine whether Covad is entitled to enter into a Section 252
12 interconnection agreement as a telecommunications carrier or whether it is now an
13 information service provider without a right to a Section 252 agreement. Accordingly,
14 Qwest respectfully requests that the Commission order Covad to respond to these
15 comments with a statement -- supported by factual information about its product and
16 service offerings -- of whether it is a telecommunications carrier or an information service
17 provider. Specifically, Covad should be required to demonstrate whether its offerings in
18 Arizona include more than just (1) DSL service bundled with Internet access, or (2) DSL
19 transmission service that is provided as an information service, not as a
20 telecommunications service.

21 In addition to triggering this overarching issue, the *Wireline Broadband Order*
22 includes findings and conclusions relating to the highly competitive state of the wireline
23 broadband market that bear upon Covad's demand -- relating to Arbitration Issue No. 1 --
24 that Qwest be required to provide Covad with an "alternative service" before retiring a
25 copper loop in its Arizona network. In ruling that wireline Internet broadband access
26 service is an information service that no longer requires a high level of regulation, the
27 FCC found in the *Wireline Broadband Order* that the market for broadband service is

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1 highly competitive.² The FCC observed, for example, that the "broadband Internet access
2 services in most parts of the country are offered by two established platform providers,
3 which continue to expand rapidly, and by several existing and emerging platforms and
4 providers, intermodel and intramodel alike."³ The FCC determined that the existence of
5 this robust market, combined with the Congressionally-mandated objective of promoting
6 investment in broadband infrastructure, supports the elimination of certain wireline
7 broadband unbundling obligations and, in general, "a lighter regulatory touch."⁴

8 In demanding that Qwest be required to provide an "alternative service" before
9 retiring a copper loop over which it is providing DSL service, Covad is asking this
10 Commission to head in a direction precisely opposite to that taken by the FCC in the
11 *Wireline Broadband Order*. In contrast to the "lighter regulatory touch" the FCC has
12 adopted for wireline broadband service, the "alternative service" requirement Covad
13 would have this Commission impose represents an extreme form of regulation that no
14 regulatory body has ever adopted. The same factors that led the FCC to curtail the
15 regulation of wireline broadband Internet access -- competition in the marketplace and a
16 desire to promote investment in broadband infrastructure -- require that the Commission
17 reject Covad's alternative service demand. Indeed, even before the FCC issued the
18 *Wireline Broadband Order*, all four commissions that considered this Covad proposal
19 rejected it as unlawful.⁵ The *Wireline Broadband Order* leaves no doubt that these rulings
20 were correct.

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24 ² *Wireline Broadband Order* at ¶ 19.

25 ³ *Wireline Broadband Order* at ¶ 19.

26 ⁴ *Wireline Broadband Order* at ¶¶ 3, 19.

27 ⁵ The commissions in Colorado, Minnesota, Utah and Washington rejected Covad's proposal in
28 orders issued in Qwest/Covad arbitrations before the FCC's release of the *Wireline Broadband Order*. The New Mexico arbitration commission also rejected Covad's proposal after release of the FCC's order without relying on the order.

1 **II. DISCUSSION**

2 **A. The Wireline Broadband Order Calls Into Question Whether Covad is a**
3 **Telecommunications Carrier Entitled To An Interconnection Agreement.**

4 Under the 1996 Act, only "telecommunications carriers" are entitled to enter into
5 interconnection agreements with incumbent local exchange carriers ("ILECs"). Thus, in
6 addressing the procedures for negotiated interconnection agreements, Section 252(a)(1)
7 provides that upon receiving a request pursuant to Section 251, an ILEC "may negotiate
8 and enter into a binding agreement with the requesting *telecommunications carrier* or
9 carriers" (emphasis added). Section 252(b)(1), which addresses arbitrated
10 interconnection agreements, provides similarly that a "carrier" -- which is the same
11 "telecommunications carrier" referred to in Section 252(a)(1) -- may petition a state
12 commission for arbitration of an interconnection agreement.

13 The Act defines a "telecommunications carrier" as "any provider of
14 telecommunications services."⁶ Under this definition, a carrier that provides only
15 information services and no telecommunications services is not a telecommunications
16 carrier. Such a carrier is not permitted to avail itself of the negotiation and arbitration
17 provisions in Sections 252(a) and (b), since the rights those provisions confer are limited
18 to telecommunications carriers.

19 In the *Wireline Broadband Order*, the FCC ruled in clear terms that wireline
20 broadband Internet access service is an information service: "[W]e conclude that wireline
21 broadband Internet access service provided over a provider's own facilities is
22 appropriately classified as an information service because its providers offer a single,
23 integrated service (*i.e.*, Internet access) to end users."⁷ The FCC explained further that the
24 classification of wireline broadband Internet access as an information service applies
25 regardless whether the provider of the service uses its own transmission or those of
26 another carrier:

27 There is no reason to classify wireline broadband Internet access services

28 ⁶ 47 U.S.C. § 153(44).

⁷ *Wireline Broadband Order* at ¶ 14.

1 differently depending on who owns the transmission facilities. From the
2 end user's perspective, an information service is being offered regardless of
3 whether a wireline broadband Internet access service provider self-provides
4 the transmission component or provides the service over transmission
5 facilities that it does not own.⁸

6 As Covad will surely point out, while classifying wireline broadband Internet
7 access service as an information service, the FCC also stated that "nothing in this Order
8 changes a requesting telecommunications carriers' UNE rights under Section 251 and our
9 implementing rules."⁹ This statement clarifies that carriers are permitted to purchase
10 UNEs to provide *as a telecommunications service* only the transmission service that
11 underlies Internet access -- not the transmission service bundled with Internet access.¹⁰
12 Carriers also can choose to provide this unbundled transmission service *as an information*
13 *service*. Covad is not a telecommunications carrier entitled to an interconnection
14 agreement if its Arizona service offerings only include Internet transmission service
15 provided as an information service or the transmission service bundled with Internet
16 access.

17 Accordingly, the Commission should require Covad to demonstrate whether it is
18 offering in Arizona products other than DSL service bundled with Internet access or
19 Internet transmission service as an information service. Only with this information will
20 the Commission be able to determine whether Covad still qualifies as a
21 telecommunications carrier.

22 **B. The Wireline Broadband Order Confirms the Unlawfulness of Covad's**
23 **Demands Relating to Qwest's Retirements of Copper Facilities.**

24 The parties' testimony and post-hearing briefs address in substantial detail Covad's
25 request that Qwest be required to provide an "alternative service" before retiring a copper
26 loop that Covad is using to provide DSL service. The multiple legal and structural flaws

27 ⁸ *Wireline Broadband Order* at ¶ 16.

28 ⁹ *Wireline Broadband Order* at ¶ 127.

¹⁰ In this regard, the FCC stated at paragraph 127 of the *Wireline Broadband Order* that "[s]o long as a competitive LEC is offering an "eligible" telecommunications service - i.e., not exclusively long distance or mobile wireless services - - it may obtain that element as a UNE."

1 in Covad's proposal have caused each of the five state commissions that have considered
2 the proposal to reject it. While the *Wireline Broadband Order* does not directly address
3 copper retirement, the FCC's reasoning in that order reinforces the inappropriateness of
4 Covad's alternative service proposal.

5 The same factors and reasoning the FCC relied upon in deciding to minimize
6 regulation of wireline broadband Internet access compel rejection of Covad's alternative
7 service proposal. For example, Covad attempts to support the proposal with the claim that
8 consumers will be deprived of Internet broadband alternatives if Covad's DSL service is
9 terminated by Qwest's retirement of a copper loop. The first response to this assertion is
10 that Covad's concern is unfounded and not supported by experience. Qwest has never
11 terminated Covad DSL service through retirement of a copper loop in Arizona or in any of
12 the other 13 states in Qwest's region. In addition, the FCC's rulings in the *Wireline*
13 *Broadband Order* are based in substantial part on the finding that the market for
14 broadband Internet access services is robust and highly competitive.¹¹ This finding and
15 the substantial evidence upon which it is based directly contradict Covad's claim that
16 consumers will be without service alternatives if the retirement of a copper loop results in
17 discontinuance of Covad's DSL service.

18 The rulings in the *Wireline Broadband Order* also are founded on the FCC's
19 determinations that regulation of broadband Internet wireline access services discourages
20 investment in broadband infrastructure, which contravenes Congress's directive in Section
21 706 of the Act to promote this type of investment.¹² As Qwest demonstrated in its
22 testimony and briefs, Covad's alternative service proposal discourages investment in
23 facilities that support broadband services. Specifically, if Qwest is required to provide a
24 costly alternative service to Covad when it replaces a copper loop with a fiber facility, it
25 will have reduced incentive to deploy the fiber facilities that are essential to robust
26 broadband service. This disincentive is exacerbated by the terms of Covad's proposal that

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28 ¹¹ *Wireline Broadband Order* at ¶ 19.

¹² *Wireless Broadband Order* at ¶ 19.

1 would prevent Qwest from recovering all the costs it would incur to provide the
2 alternative service.

3 In sum, the FCC's reasoning and findings in the *Wireline Broadband Order*
4 confirm the validity of Qwest's arguments against Covad's alternative service proposal and
5 the correctness of the five state commission decisions that have rejected the proposal.

6 **III. CONCLUSION**

7 For the reasons stated, the Commission should: (1) require Covad to demonstrate
8 whether it is a telecommunications carrier or an information service provider in Arizona,
9 and (2) reject Covad's alternative service proposal.

10 RESPECTFULLY SUBMITTED this 21st day of November, 2005.

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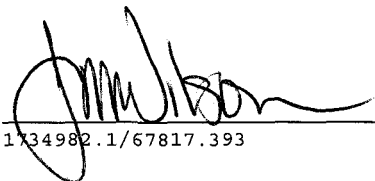
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